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In The
Supreme Court of the United States
OCTOBER TERM, 1971

No. 71-5618

ABBOTT FINISTER,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF WASHINGTON

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

As discussed in the Argument, *infra*, 28 U.S.C. §1257 does not grant the Court jurisdiction to consider this petition.

STATUTES AND RULES INVOLVED

RCW 26.20.030 *Desertion or nonsupport—Penalty.*

(1) Every person who: . . . (b) Wilfully omits, without lawful excuse, to furnish necessary food, clothing, shelter, or medical attendance for his or her child or children . . . shall be guilty of the crime of family desertion or nonsupport.

RCW 26.20.080 *Proof of wilfulness—Application of penalty provisions.*

Proof of . . . the omission to furnish necessary food, clothing, shelter, or medical attendance for a child or children . . . is prima facie evidence that such . . . omission to furnish food, clothing, shelter, or medical attendance is wilful.

Washington Court Rules, Supreme Court Rules on Appeal

Rule I-15. *Jurisdiction*

> The supreme court shall acquire jurisdiction of a cause of proceeding when a petition for review is granted. . . .

Rule II-2. *Review by Appeal*

> (a) *When Allowed.* When the court of appeals reverses a judgment or order of the superior court by less than a unanimous decision, the aggrieved party may appeal or cross-appeal to to the supreme court.

QUESTION PRESENTED

Whether a rebuttable presumption, that a physically and vocationally able parent who fails to furnish necessities for his children does so wilfully, violates a defendant's constitutional presumption of innocence or unconstitutionally compels him to incriminate himself.

STATEMENT OF THE CASE

In addition to petitioner's statement of the case, the following facts should be noted.

The trial court found (Finding of Fact II, Petition at A-2):

> That the defendant was employable and capable of earning sufficient money to furnish necessary food, clothing, shelter and medical attendance for the children named in the Second Amended Information during the periods charged.

Testimony which lead the court to this conclusion included that of the Complaining witness, who testified that petitioner was a welder, and that of H. A. Johnson, who testified that petitioner earned $2,298.87 from May 20 to August 1, 1969 (included within the charging period) and was eligible for rehire. Petitioner's son, Danny, who lived with him part of the time, testified that his father had numerous jobs. He also testified that there were times when his father did not seek work. The trial court observed petitioner and noted that he appeared to be physically able.

The trial counsel for petitioner stated in opening statement that petitioner's defense was an agreement that petitioner would support the boys and complainant and her present husband would support the girls.

Petitioner gave no testimony to refute vocational or physical ability to earn sufficient money to support his children.

ARGUMENT

I.

The Court Lacks Jurisdiction

The Court does not have jurisdiction to consider this petition for a writ of *certiorari* to the Supreme Court of Washington, since the latter court was not the "highest court . . . in which a decision could be had

. . ." under 28 U.S.C. §1257.

Under Washington Court Rules, Supreme Court Rules on Appeal, Rule II-2, petitioner had no right of appeal from the decision against him in the state Court of Appeals, since the latter court affirmed the judgment of the superior court (Petition at A-8). Petitioner's only recourse was to seek the discretionary review of the Supreme Court of Washington. The only action taken by the latter court was to deny petitioner's Petition for Review without opinion (Petition at A-10), and that court never acquired jurisdiction of this case since jurisdiction is not acquired in the case of a petition for review until the petition is granted. Washington Court Rules, Supreme Court Rules on Appeal, Rule I-15.

In cases where the only action of a state's highest court was to deny discretionary review, it has been held that a petition for writ of *certiorari* could not be directed to that court. *Randall v. Board of Commissioners of Tippecanoe County,* 261 U.S. 252 (1923); *American Railway Express Co. v. Levee,* 263 U.S. 19 (1923). Since this petition is directed to the wrong court, it should be dismissed.

Although this jurisdictional defect cannot be and is not waived, it is additionally possible to show that the question presented by this case is not one which merits review by this Court.

II.

There Is No Conflict of Decision

Petitioner attempts to attack the decision of the court below (the Washington Court of Appeals, not the Supreme Court of Washington which never took jurisdiction of this case), as in conflict with this Court's holding in *Leary v. United States,* 395 U.S. 6 (1969).

It can be shown, however, that petitioner misstates both the presumption which he seeks to attack as unconstitutional and the holding of this Court in *Leary.* The holding of the court below, that the presumption of wilfulness of nonsupport does not violate a defendant's constitutional presumption of innocence or constitutional right to refuse to incriminate himself, is in accord with the *Leary* decision.

A. The Statutory Presumption as Construed Presents No Substantial Constitutional Question

Petitioner misstates the presumption of wilfulness deriving from RCW 26.20.080, which he seeks to attack as unconstitutional. The court below held that the *prima facie* case establishing wilfulness of nonsupport as provided for in that statute is not unconstitutional "where the state establishes the failure to support *and that defendant is physically and vocationally able to work. . . .*" (Petition at A-7, emphasis added.)

This holding recognizes that the state's burden of proof is considerably beyond that appearing on the face of the statute. The state must not only prove failure to support; it must also prove the defendant's physical and vocational ability to work before the *prima facie* case of RCW 26.20.080 is made out. The court was satisfied with the trial court's findings in this regard.

The construction given a statute by a state appellate court "puts these words in the statute as definitely as if it had been so amended by the legislature." *Winters v. New York,* 333 U.S. 507, 514 (1948). The construction which the court below gave to RCW 26.20.080 puts the great burden of proof of "wilfulness" on the state. In addition, the court below stated that, "The trier of fact need not believe even the unrebutted presumed fact of willfulness." (Petition at A-7.)

Petitioner attacks the statutory presumption as if it had never been construed by the courts. As construed, it is highly limited, and presents no constitutional question meriting the special consideration of this Court.

B. The Decision Below Is in Accord With This Court's Holding in *Leary*

In *Leary v. United States,* 395 U.S. 6 (1969), this

Court considered the use of presumptions in criminal cases, and held that such presumptions would not violate a defendant's constitutional presumption of innocence and right to refrain from giving incriminating testimony if:

> It can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. (*Leary*, 395 U.S. at 36.)

Petitioner argues, however, that *Leary* stands for the proposition "that a presumption which has at least a 90 percent chance of being accurate does not meet the federal constitutional test of due process." (Petition at 9.) This figure has no support in *Leary*, where this Court held that, for the presumption of "knowing" possession of imported marijuana to be upheld, it was necessary to find that "*at least a majority* of marijuana possessors have learned of the foreign origin of their marijuana. . . ." (395 U.S. at 52; emphasis added.)

The court below considered the presumption of "wilfulness" of nonsupport and found it in keeping with the *Leary* test. (Petition at A-6.) The court noted that the statute involves questions in an area outside of special judicial knowledge, and that therefore considerable weight should be given to the legislative determination. (Petition at A-5.)

Respect for the legislative determination should be given considerably more weight in this case than in *Leary* for several reasons. First, the presumption as it appears on the face of the statute, RCW 26.20.080, has already been considerably restricted by judicial construction, as discussed above. Second, a presumption of knowledge as was involved in *Leary* may be rebutted only by a negative showing (lack of knowledge), impossible of real proof, while the presumption of wilfulness involved here may be rebutted by testimony showing any form of inability to secure employment or other excuse. "Convenience" will not justify use of a presumption suspect on its face, but that is not the case here. Where a presumption is reasonable on its face *and* offers ample opportunity for rebuttal, special weight should be given to the legislative determination which created the presumption. This is especially true where a public interest as vital as the furnishing of necessities to children is involved, as in this case.

Third, petitioner does not point the way to a challenge of the presumption in question. The sole evidence on which petitioner bases his attack indicates that during the period in question about 90 percent of the black labor force and more than 95 percent of the white labor force were employed. Petition at 11.) But the question which must be answered in the nega-

tive if the presumption involved is to fall is: Is it *more likely than not* that a physically and vocationally able parent who does not support his children does so wilfully? The state legislature and courts have determined that the answer to this question is yes. Petitioner's evidence makes no case contradiction of this.

III.

There Is No Other Constitutional Question of Substance

Petitioner's claim that the statutory presumption of "wilfulness" of nonsupport violates equal protection is based solely on the fact that blacks have a higher rate of unemployment than whites. (Petition at 11.)

There is no question that various social groups have different expected earning capacities; this is true of persons with college educations and high school dropouts, men and women, unskilled teenagers and trained 30-year-old, as well as blacks and whites.

The *Leary* test of a presumption's validity is, however, a general test. It does not require that a presumption be accurate when applied to every individual and every social group; no factual presumption could be so conclusive.

Petitioner does not claim that the manner in which the presumption is applied varies between blacks and whites. Even if the *Leary* test were applied to blacks

alone, petitioner's figures, that 90 percent of the black labor force was employed during the given period, do not indicate that the presumption of wilfulness was unwarranted when applied to physically and vocationally able black parents who failed to support their children.

It is true that there are numerous social differentials, but these do not warrant holding a generally valid presumption to be unconstitutional. Such differentials are greatly lessened by the fact that the state must prove not only physical but also *vocational* ability before the presumption of wilfulness can become effective. In addition, equal employment opportunity laws are lessening the impact of race on employment and earning capabilities.

Most importantly, once the state has met its complete burden of proof, any person may rebut the presumption by showing lawful excuse for his failure to support, including inability to secure employment, or to earn a sufficient income to support his children.

To hold as petitioner requests that the questioned presumption cannot be applied to a person in a group which has 90 percent employment, while it can be applied to one with 95 percent employment, would involve this Court in particularized reviews of statutes which are valid by general tests and which are applied

equally to all, but which may have a slightly different impact on one or more of the many diverse groups in this society than on others, even where there is ample opportunity to bring out such differences in rebuttal. Surely the statute involved here, as construed, is not an important example of a statute which is discriminatory in effect, and it is not even claimed that it is discriminatory in applicaton. Neither this "equal protection" claim of petitioner, nor his claim that the decision of the court below was contrary to the decision of this Court in *Leary,* presents a constitutional question meriting the special attention of the Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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